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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. 71-270

KEN AKER, INC., a corporate citizen of West Virginia,
Petitioner,

vs.

GIRARD TRUST BANK, a corporate citizen of Pennsylvania,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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Petitioner, Ken Aker, Inc., prays that a Writ of Certiorari be issued to the Circuit Court of Kanawha County, West Virginia, to review its judgment entered in the above entitled cause September 14, 1970, a second application to the Supreme Court of Appeals of West Virginia for Writ of Error having been denied without reason June 14, 1971 after the time for a further application had expired.

JURISDICTION

This action involves diversity of citizenship where the amount in controversy exceeds $10,000.00. The jurisdiction of the Supreme Court of the United States is based upon a denial of rights guaranteed petitioner under the United States Constitution, including denial of due process and equal protection of laws:

(a) Article III, Section 1, "The judicial power shall extend to all cases in law and equity arising under the constitution * * * between citizens of different States;"

(b) Article IV, Section 1, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Section 2, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

(c) Article VI, second paragraph, "This constitution * * * shall be the supreme law of the land; and the judges of every state shall be bound thereby,"

(d) Amendment V, "no person shall * * * be deprived of * * * property without due course of law."

(e) Amendment VII, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

(f) Amendment XIV, Section 1, "No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due course of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(g) Article III, Section 17, Constitution of West Virginia, "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

(h) U. S. Code Annotated, Title 28, Section 1257, Certiorari, (3) State Courts. Where any right or privilege is claimed under the U. S. Constitution.

(i) Time for Certiorari, Section 2101(c), from the state courts. "shall be applied for in 90 days after entry of such judgment or decree; Section 2104, "from a state court shall have the same effect as if the judgment or decree appealed from had been rendered in a court of the United States."

(j) Rule 75(d) "assignment of errors unnecessary.

(k) Supreme Court Rule 23, Petition for Certiorari, requirements.

(l) *In a similar situation the Supreme Court of the United States reversed the Circuit Court of Calhoun County, West Virginia, where the Supreme Court of Appeals of West Virginia had refused an appeal unanimously "as plainly right" upon a fourth application. Mathews et al. v. West Virginia ex rel. Hamilton, Prosecuting Attorney,* 320 U. S. 707.

(m) The present case was brought in the Circuit Court of Kanawha County, West Virginia, by Girard Trust Bank, a corporate citizen of Pennsylvania, against Ken Aker, Inc., a corporate citizen of West Virginia and North Carolina, to recover an alleged deficiency upon an alleged contract to buy back negotiable securities, after Girard had disposed, allegedly illegally, of mobile homes seized as security. Judgment for Girard against Ken Aker, Inc. on September 14, 1970, for $49,442.65 with interest at 6% per annum on $40,591.69 thereof from August 27, 1970, and costs, *was rendered without counsel for Ken Aker, Inc. having had an opportunity to make a closing argument as had been promised, Volume III, pages* 292 - 293, *and again at the conclusion of the testimony, and upon at least five occasions between January* 9, 1967, *when the testimony was completed, and September* 14, 1970 *when the final order was entered, more than twenty months later, during which period of time many important points, facts and applicable laws were obviously forgotten, overlooked and not considered, which would have been pointed out if such argument had been heard.*

(n) Denial of the right to trial by jury.

(o) A second application for writ of error was made to the Supreme Court of Appeals of West Virginia in due time and declined without reason on June 14, 1971, after the time for a further application had expired.

(p) For the foregoing and further reasons hereinafter more fully expressed it is believed that the aforesaid judgment of the Circuit Court of Kanawha County, West Virginia, deprives Ken Aker, Inc. of rights to which it is entitled under the Constitution of the United States, and that the Supreme Court of the United States has jurisdiction to

dispense justice herein. The questions raised are also of great general and public interest.

STATE JURISDICTION

At the beginning of the trial defendant opposed maintenance of the action upon the ground that Girard Trust Bank was doing business illegally in West Virginia and North Carolina, and without being qualified in either State, wherefore it was not entitled to maintain this suit, except to be a defendant to the counter suit of Ken Aker, Inc.

QUESTIONS PRESENTED

1. Was Ken Aker, Inc. deprived of due process of law and the equal protection of the law in violation of the United States Constitution under the facts and circumstances of this case as hereinafter detailed?

2. Was Ken Aker, Inc. entitled to be heard by its counsel in a concluding argument before submitting its case as requested when the testimony and evidence were completed, and as promised by the trial judge before (Volume III, page 292-293, "I am going to read these contracts and will give you a chance to argue the case and to brief it extensively. You don't have to make a speech to me now, Mr. Meldahl." Record page 663) and Volume III, page 396, Record 766, "After the record has been delivered you may come down and see me and I will set up a schedule for filing briefs and hearing oral arguments, if you wish, sometime in the future." Counsel for Ken Aker, Inc. spoke to the Judge at least five times asking when he expected to be ready to consider the case further, and was told each time that he did not know as yet. The taking of the testi-

mony was concluded on January 9, 1969. Counsel was greatly surprised to receive the Court's "Memorandum of Opinion" dated August 3, 1970, (incorporated by reference in the final judgment order dated September 14, 1970, "to which decisions and rulings of the Court and the judgment rendered thereon the defendant did object and except."

3. Was Ken Aker, Inc. unlawfully denied a writ of error by the Supreme Court of Appeals of West Virginia upon two applications made to that Court, the latter application having been denied without reasons June 14, 1971 when time for further application had expired, in violation of due process, as held in a similar situation by the Supreme Court of the United States in *Mathews et al.* v. *West Virginia ex rel.* Hamilton, Prosecuting Attorney, 320 U. S. 707?

4. Did the mobile homes purchased from manufacturers and wholesalers with funds furnished by Girard Trust Bank, hereinafter called Girard, become immediately Girard's property, in the custody of its trustee and agent Ken Aker, Inc. as bailee, under the terms of the Dealer Floor Plan Agreement, so that it was actually Girard doing business in West Virginia and North Carolina without being qualified in those States and therefore illlegally, as contended by Ken Aker, Inc., hereinafter called Ken Aker?

5. Could Girard acquire good title to the mobile homes free from the rights of the retail purchasers in West Virginia and North Carolina sold by Ken Aker either as agent for an undisclosed principal, or as principal, without any disclosure of the Dealer Floor Plan Agreement or Financing Agreement between Girard and Ken Aker, and without foreclosure under the laws of those States, the Uniform

Commercial Code not having become effective in West Virginia until July 1, 1964, and in North Carolina until June 30, 1967?

6. Was Girard obligated to offer the security instruments it held, rather than the mobile homes that belonged to the purchasers and were security therefore, which it never attempted to do according to the uncontroverted evidence?

7. Was the trial Judge right in saying, "As earlier indicated in this case, we are not concerned with the relationship between Girard Trust Bank and these retail purchasers. We are concerned with the relationship between Girard Trust Bank and Ken Aker, Inc."? (Volume II, page 313).

8. Under the Uniform Commercial Code definition of a "Commercial Unit" set out in paragraph 6, Section 5, GENERAL CONSTRUCTION OF SUBJECT MATTER, as follows, "Commercial unit means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole," would Girard be able legally to sell twenty-two, or even eight, mobile homes in a single lot, and hold Ken Aker liable for a deficiency?

9. Did Girard comply with the provisions of even the Uniform Commercial Code of Pennsylvania, requiring that every aspect of each sale, "including the method, manner, time, place and terms," be commercially reasonable, when

it mailed letters to only eleven mobile homes dealers, in Tennessee, Virginia, Maryland, New Jersey, Delaware, Pennsylvania, none in West Virginia and only one in North Carolina, inviting them to make cash bids on nineteen, all in West Virginia and North Carolina, and upon receiving no replies, calling three over long distance and inducing them to make bids sight unseen, the highest of the three being Dick Moore, Inc., of Memphis, Tennessee, of $28,200 for twenty-two mobile homes, the only notice (Dx-1) given Ken Aker being by certified letter No. C 663020, Px-C, (Dx-2B) mailed from Philadelphia November 1, 1966, put in Ken Aker's post office box November 4, 1966, a Friday, and not received until November 8, 1966, as Girard was advised by the post office return receipt (Dx-3) Girard had requested, which letter stated that Dick Moore's offer would be accepted at 9:00 o'clock A.M., November 4, 1966, unless Ken Aker paid Girard before then $71,408.76. Record, Vol. III, page 281?

10. Was Girard entitled to demand from Ken Aker, Inc. approximately fifteen thousand dollars more than the trial Court found Girard entitled to as a condition to a settlement?

11. Was Girard not required to sell each mobile home separately to retail purchasers if they would pay the balance owed thereon by the original purchasers and expenses of resale, so that there would be no deficiency for which Ken Aker might be liable?

12. Was Ken Aker liable for any deficiency upon those mobile homes that no demand was made for within 125 days of the first default, as the Court found, (Page 7, Memorandum of Opinion), namely: Ritzcroft sold to Bull-

ard, Wolverine sold to Taylor, Pontiac sold to Wollard, Huntington sold to Evans and Suis, Richardson sold to Pope, Pontiac sold to Curling, and Statesman sold to Jenette, the amounts owed thereon set out in Girard's complaint being $22,915.83?

13. Was Girard's change of policy, restricting its mobile homes financing to near Philadelphia, due to its mistaken claim of "double financing", instead of the reasons Girard gave in its letter of June 13, 1966 to Ken Aker, Inc. saying, "I want to be sure that you know we consider our past experience with you as excellent,"?

14. Under the termination provision in the Financing Agreement (10 TERMINATION), which provided, "such termination shall not effect the rights and liabilities of either party arising out of any transactions within the scope of this agreement occuring prior thereto," were Ken Aker and the retail purchasers not entitled to the same privileges as prior threto, such as the right to find other customers to take over and carry out the unfulfilled part of each customer's obligations, a right Girard denied, requiring every customer who became one or two payments behind to pay immediately and in full the entire unpaid balance of his contract?

15. Could customers' contracts be put on "floor plan" without their knowledge and consent?

16. Could Girard gain ownership of a purchaser's property rather than a lien upon it by any kind of a deal between Girard and Ken Aker without the purchasers being consulted or agreeing to it in writing?

17. Would Ken Aker be liable for a deficiency in the Hovatter matter, when she offered to get from her mother immediately the two payments in default as a result of her husband being killed in a motorcycle accident, when Girard's representative refused it and demanded the entire unapid balance not then due, and demanded that she vacate immediately, in a most reprehensible and unconscionable manner? Proceedings January 7, 1969, Volume II, page 312.

18. Was Mrs. Kay Hovatter's testimony properly refused when the Judge said later he would read it and "determine then if it is relevant", but nothing in the record gives any indication that he did so, and the contrary is evident from the Court's decision?

19. Was the act of Girard's officer and witness Raymond J. Biggan lawful who had the notices sent to customers who were one or two payments due, as follows (Volume II, page 332), "This is to give you formal notice that this Bank *has taken your mobile home* because of default in the payment on your account. The vehicle is now in storage at ..... You can redeem the vehicle within 15 days from the date of this letter upon payment of the following, plus any additional charges incurred. Balance due on Contract $....., Finance Charge Rebate $....., Late Charges $....., Towing $....., Storage $....., Total Amount Due $..... *This amount is payable to the Girard Trust Bank, Second & Chester Streets, Philadelphia, Pennsylvania. Should you fail to redeem the vehicle within the time allotted, it will be sold and the net proceeds from the sale applied to your account. If the proceeds from the sale are not sufficient to pay your obligation in full, you will then be responsible for any remaining unpaid balance due.*" *Was what he stated to the*

purchasers of the mobile homes involved in this case correct? Was it unconscionable?

20. *Was there not a presumption at least that Dick Moore, Inc.'s offer had been accepted on November 2nd, 1966, when a permit was obtained on that date from the State of West Virginia to move some of those mobile homes to the Kentucky line, and at least one of them was moved on November* 3, 1966? (See testimony of Roy Hoel, and Defendant's Exhibit 4, Volume II, pages 227, 229, 230, and Exhibit 5 flagged November 3, 1966. He moved two of the mobile homes on November 3, 1966. Volume II, page 233 and 234).

21. Was the trial Court correct in denying trial by jury?

22. Under all the facts and circumstances mentioned and alluded to has Ken Aker, Inc. been accorded due process of law?

23. Has said corporation been able to obtain the equal protection of the law?

24. Could Ken Aker be charged interest at 6% per annum on the $40,591.65 principal amount of the judgment during the twenty months the trial judge took to handle other cases before rendering his decision in this one?

STATEMENT OF THE CASE

This case involves primarily the question of whether or not Ken Aker, Inc. has been deprived of due process, and equal protection of the laws, in violation of the United

States Constitution, by the Circuit Court of Kanawha County, West Virginia, and the Supreme Court of Appeals of West Virginia, as held by the Supreme Court of the United States in the analogous case of *Mathews et al.* vs. *West Virginia ex rel.* Hamilton, Prosecuting Attorney, 320 U.S. 707? The determination of these questions rests upon proper answers to a number of questions which provide foundations for the conclusins hereinafter set out.

The case below has not been reported.

1. The first question is whether Girard Trust Bank was entitled to maintain this action against Ken Aker, Inc., and the answer to this question depends upon whether or not Girard Trust Bank, hereinafter called Girard. was doing business unlawfully by not being qualified in West Virginia. The business commenced under a Floor Plan Agreement containing the following provisions:

Girard would furnish Ken Aker, Inc., hereinafter called Ken Aker, funds to purchase mobile homes and accessories from manufacturers and wholesalers under the following terms, that:

> "All, right, title and interest in the goods and documents is hereby transferred to you (Girard)". "In consideration of the delivery of such goods and documents to us, (Ken Aker) we will hold the same in trust for you as your (Girard's) property for the sole purpose of sale. We will not operate, use or demonstrate the Goods, except with your approval. We will store the Goods only at such places as you may from time to time approve. We will not lend, rent or encumber the Goods, and will keep them

safely stored and free from all tax claims, liens and other encumbrances. We will pay all your costs and expenses incurred by you in protecting your interest in the goods and documents. * * * We will keep all goods, documents and the proceeds of sales belonging to you separate and capable of identification as you property, will make entries on our books showing that the goods and documents are held for your account, and will report all sales to you immediately, and on demand will furnish you a report of the preceding month's sales. You may examine our books and all documents at any time. We understand that in most instances you will (although you are under no obligation to us to do so) insure the goods against such risks, in such companies and in such amounts as you may deem proper. We agree, however, that upon demand by you we will keep all goods fully insured at our expense from the time the shippers' responsibility ends, in such companies and amounts and against such risks as you may direct, payable to you as your interest may appear, the policies or evidence thereof to be delivered to you on demand. You may at any time cancel the trust and *take possession of any and all goods and documents and any and all proceeds of sales.* * * * We hereby assign to you all refunds, rebates, adjustments or other credits payable to us by any shipper or anyone else with respect to any goods and documents and you may apply same against any obligation of ours to you." * * * "If there is any inconsistency between the terms of this agreement and any trust receipt, note or other document, the provisions of this agreement shall prevail. You have a continuing right of set-off against and lien upon all deposits, funds, accounts, securities, in-

> struments and other property, tangible or intangible, at any time in your (Girard's) possession and belonging to us (Ken Aker), as security for all our obligations hereunder, and also any other obligations of ours due or to become due, or that may hereafter be contracted, whether direct or contingent, and whether joint, several or with others not parties, so that the deficiency on one shall be made good from the collateral for the others." (Parentheses and italics are added for clarity).

Petitioner contends that under the said provisions Girard was principal, and Ken Aker was Girard's trustee and sales agent whether it disclosed Girard as principal or not. Inasmuch as Girard was not qualified to do business in either West Virginia or North Carolina, it was not entitled to maintain this action in violation of Chapter 31, Aritcle 1, Section 79, Code of West Virginia. Corporation Journal Vol. 26, No. 8, Dec. 1970-Feb. 1971, Complete No. 489, page 175, states.

> "In Florida, West Virginia and Wisconsin, the statutes specifically provide that an unlicensed foreign corporation may not hold or dispose of property in the State, * * * It is clear that if the sale of samples amounts to regular sales from a stock of goods, qualification will be required. Thus, where a foreign corporation furnishes its local salesman with a stock of goods to be used not only as samples but also to fill orders, the courts have held that qualification is necessary." A long list of citations that follows includes *Dalton Adding Machine Co.*, v. *Commonwealth*, 118 Va. 563, Affirmed 246 U.S. 498. The same applies to North Carolina.

Said Chapter 31, Article 1, Section 79 prohibiting foreign corporations from doing business in West Virginia without beng qualified under State law provided further that *nothing in said statute shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section upon any contract or for any wrong.*" Ken Aker was surely entitled to maintain its counter claim for damages it had sustained by Griard's wrongful acts. The trial judge, however, erroneously regarded Girard's action as coming under the provisions of Chapter 31, Article 1, Section 79(a) allowing foreign finance corporations making loans on real estate in West Virginia to do that business without being qualified. Such construction would deny the equal protection of the laws, but was inapplicable to the situation here because those finance companies are not engaged in owning or selling the property they finance, as Girard was in the instant case with regard to the mobile homes it acquired in the manner hereinbefore set out in its floor plan agreement, the form of which was its own invention.

The Dealer Floor Plan Agreement was initiated in the form of an application, dated January 28, 1963, provided that it would be construed according to the laws of the Commonwealth of Pennsylvania, and was accepted February 5, 1963. At the same time Girard's representatives solicited from Ken Aker in Charleston, West Virginia a Financing Agreement executed there January 28, 1963, bearing no provision in regard to the laws of any particular State to govern the interpretation and application of its provisions. Girard regarded them as separate agreements, subsequently terminating the Financing Agreement as of July 1, 1966, and the Dealer Floor Plan Agreement as of September 1, 1966, by Girard's letter of June 13, 1966. (Ken Aker's exhibit 1). The Court, however, erroneously regarded the

two separate agreements as one, and applied the power of attorney in paragraph 11, which according to its terms applied only to financing under the Dealer Floor Plan Agreement, to the transfer of *customer* deferred purchase money contracts under the Financing Agreement, to "floor plan", the power of attorney in the Financing Agreement, paragraph 7, applying only to supplying "the Dealer's name" to contracts, remittances and documents upon which endorsement or assignment may be omitted but may be required * * * to supply any *omissions on any documents executed by the Dealer.*" Surely this was not authority to transfer transactions under the Financing Agreement to the Dealer Floor Plan Agreement. No grounds were suggested therefor during the trial other than the Judge's inspiration that the two agreements were one or should be so treated.

2. At the time Girard instituted its action there were no instances where Ken Aker owed Girard anything under the Dealer Floor Plan Agreement, all purchases of mobile homes and accessories from manufacturers and wholesalers having been fully paid for as sold. Business between the parties continued on a satisfactory basis for approximately three and one-half years, and until Girard changed its policy, explaining in its letter to Ken Aker dated June 13, 1966 (Ken Aker exhibit 1) its reasons for doing so as follows: "The current high level of loans and the pressure from all segments of the economy for the available funds, coupled with the cost of creating them and the return on them prohibits our continuing to allocate money to mobile home financing at our present velocity. Consequently, we have decided to confine our activity to the area close to here (Philadelphia, Pennsylvania), where costs are controllable and we can be competitive. It is necessary for us to terminate your wholesale and retail agreements. The termination dates are: July 1, 1966 for the retail. (Fi-

nancing) and September 1, 1966 for wholesale (Floor Plan). I want to be sure that you know we consider our past experience with you as excellent and feel confident we will be able to count on your cooperation in the future. In the years ahead, while your accounts are running off (that is, the customer contracts are being collected) certain problems are bound to arise, which I know can be solved by our working together. Hoping to see you in the near future but don't fail to get in touch with me in the meantime if I can be of any help. Sincerely, (signed Dick) R. T. Taylor, Assistant Treasurer." The foregoing letter was addressed to Mr. Ken Honaker, President, Ken-Aker, Inc., P. O. Box 1, Charleston, West Virginia 25321.

3. After Girard changed its policy it took advantage of the accelleration clause in the retail contracts with its customers immediately upon default. Whenever a payment or two was not met when due it accelerated the unpaid balance and demanded the entire amount at once. It also refused to let either Ken Aker or the customers obtain other customers to take over and carry out the original customers' obligations not then due by paying the amounts when due as previously. As a result a greater than usual number of default occurred, the original default having resulted from deaths, temporary layoffs or other misfortunes which could have been overcome in a short time, equities of the buyers, in some cases over half the purchase price, and in one case only $700 balance was still owed, ample security for the residue, which a court of equity would have given relief had the purchasers known how to apply. The number of defaults under the circumstances was greater than usual, and more than Ken Aker could handle in the time Girard was willing to allow. Girard put undue pressure on Ken Aker as well as the purchasers and had Ken Aker

known there was a means of obtaining equitable relief the disaster that followed might have been averted.

4. As soon as one payment, in some cases a second payment, fell due Girard's collection department sent its customers in both West Virginia and North Carolina the form card, (Plaintiff's exhibits 38 to 62, Volume I, pages 106 to 153 inclusive) mentioned on page 10 hereof.

The entire contract upon such terms and conditions was surely unconscionable and void under the Uniform Commercial Code even of Pennsylvania. If these people who had been paying on their contracts regularly from their inception got past due one or two payments because of misfortunes they had experienced it was surely unconscionable to disposess them from their homes and require them to pay the entire unpaid balance of their accounts besides the added expense Girard had needlessly placed thereon by its precipitous action due to its change of policy, for which neither they nor Ken Aker had been responsible by Girard's own explanation sent to Mr. Honaker as above set out.

5. In an effort to excuse itself to some degree Girard undertook falsely to claim at the trial that it had changed its policy because of a purely fictitious charge of "double financing." This was due to the various departments of Girard Trust Bank not knowing what was taking place in other departments. Even if the accusers had been correct Girard, who had the first lien and the title could not have been prejudiced. The facts were that Mr. Honaker, President of Ken Aker, called the proper officer who handled pay offs at Girard, told him that Ken Aker wanted to pay off the entire balance on the accounts in question, asked the amount due and if it could be reduced because the mobile

homes were old and in bad condition, and Ken Aker wanted a credit of $8,199.73 for repairs, reconditioning, refurbishing and preparing for resale, for which Girard had been billed but had not paid, and requested Girard to send the titles to the Charleston National Bank, Charleston, West Virginia where the accounts were to be paid upon receipt of the titles.

Girard's Mr. Pendergast could not give Mr. Honaker an answer without taking the matter up with other officers or committees, but promised to obtain an answer and notify Mr. Honaker. As soon as received the entire amount was paid at the Charleston National Bank. Volume III, pages 673, 674. The delay for which Girard was solely responsible caused Ken Aker a slight amount of difficulty with the customers and Associates Discount Corporation. When the matter was cleared up Girard appeared to recognize that the matter was due to a misunderstanding on the part of some members of its staff who were not aware of what had transpired between other members of its staff and Ken Aker in the matter. All this had been cleared up before this suit was started, but it was brought out at the trial only in an effort to place blame wrongfully upon Ken Aker, rather than on Girard where it belonged.

5. The Financing Agreement provided for Girard to acquire from Ken Aker "installment sale and conditional sale contracts" executed by competent and reliable parties acceptable to the Bank, taken by the Dealer in the regular course of trade for mobile homes and house trailers." It made no reference to transactions acquired by Girard under the Floor Plan Agreement as hereinbefore mentioned. Apparently it was intended to apply to installment sale and conditional sale contracts acquired by Ken Aker independently. The Financing Agreement provided that

Girard would make its own investigation of the prospective purchasers and buy "WITHOUT RECOURSE, at mutually agreeable prices such contracts taken by the Dealer," and stated in paragraph 8, "DEALER'S LIABILITY: (a) The Dealer shall have no responsibility to purchase repossessed equipment from the Bank unless tendered to the Dealer within the one hundred and twenty-five (125) day period herein referred to." There was no other reference whatsoever in the Financing Agreement concerning the period due, according to Mr. McGarrigan, Girard's manager of the mobile home financing division, "to a mistake in printing." However there was nothing to indicte that Ken Aker ever knew that a mistake had occurred. It was therefore contended by counsel for Ken Aker that the instrument was governed by its terms, and that Girard, who had furnished the instrument, could not enlarge it beyond its provisions.

The Court at Girard's insistence allowed Girard's witnesses to testify that their interpretation of the 125 day period was that it would commence upon the date of the first default, whereas Ken Aker contended that it ran from the date of the instruments. As to course of dealings, the trial judge found that no demand had been made upon Ken Aker to repurchase seven mobile homes within 125 days of the first default, namely: The Ritzcroft sold to Bullard, $3,683.97; Wolverine sold to Taylor, $2,538.45; Pontiac sold to Wollard $3,662.68; Huntington sold to Evans and Suis, $2,222.98; Richardson sold to Pope, $3,932.17; Pontiac sold to Curling, $4,508.79; and Statesman sold to Nanette, $2,366.79, totaling $22,915.83, so that on the course of dealings theory there was no consistency in Girard's contention that it ran from the date of the first default. Ordinarily pleadings are construed against the pleader, and contracts against the preparer, so the proper

construction or interpretation is one of law, and not what a party can conjure up afterwards. Mr. Honaker, President of Ken Aker testified that he understood the agreement to mean 125 days from the date of it, and that there had been no discussion of that matter with Girard's representatives. Mr. Buksi, whom the Court said seemed confused, was lead on discovery examination to say he thought it meant from the date of first default, and the Court adopted his statement rather than that of Mr. Honaker as Mr. Buksi signed the contract after Mr. Honaker authorized it, without any mention of the matter. Ken Aker thinks the instrument speaks for itself and that "the 125 day period herein referred to" ran from the date of the instrument, as any other interpretation made the without recourse provision useless as an inducement to Ken Aker for its business. Many of Girard's claims were in cases where defaults had not occurred until long after the 125 days from the dates of first defaults. The Court reduced the amount Girard sought to recover about $12,524.10 on this account, yet on this theory it should have been reduced $22,915.83, thus the theory of a course of dealings was not consistent or correct.

6. Girard was not entitled to judgment for any amount because it did not foreclose in a lawful manner in any respect, and for the further reason that Girard had transferred the contracts under the Financing Agreement to Dealer Floor Plan without the knowledge or approval of purchasers, and recourse for deficiencies against purchasers and their mobile homes was no longer available.

The Dealer Floor Plan Agreement was not applicable because it related only to mobile homes purchased new from manufacturers and wholesalers, which became Girard's property immediately, and which did not include any retail

customers' installment or conditional sale contracts in which the purchasers acquired substantial equities therein, and particularly without their knowledge and consent. The only basis Girard pretended it had a right to retail sale contracts under the floor plan agreement was the power of attorney in the Dealer Floor Plan Agreement. That power of attorney did not apply to items acquired under the Financing Agreement. The power of attorney in the Financing Agreement gave Girard authority only to "endorse and to assign (in the Dealer's name) any and all Contracts, Remittances, and Documents upon which endorsement or assignment *may be omitted* but may be required" and "to supply any omissions on any documents executed by the Dealer." (paragraph 7) The power of attorney in paragraph 11 of the Dealer Floor Plan Agreement authorized Girard "to supply any omissions in any documents executed by us (the Dealer) * * * with respect to any financing hereunder," (the Dealer Floor Plan Agreement.) This did not contemplate or authorize the transferring of any deferred purchase money contracts Girard acquired under the Financing Agreement. Ken Aker got no money whatever under this scheme, which was evidently an effort of Girard to revive accounts beyond the 125 day limitation and therefore uncollectible.

Now with regard to foreclosures, the agreement between Girard and Ken Aker could not apply to retail sales made in West Virginia and North Carolina between Ken Aker in whatever capacity and retail purchasers in those states who knew nothing about the Girard-Ken Aker agreements. Furthermore it could not apply to transactions made before or after the customer transactions without their knowledge and consent. No such agreements were ever pretended by Girard. The purchasers of the new mobile homes on dealer's

lots were governed by the same laws as merchandise in stores including automobiles. Under public policy the purchasers could buy them without fear of liens of any kind. Thus the purchasers acquired good title, subject only to the liens they themselves created. These transactions were made and completed in West Virginia and North Carolina between them and Ken Aker, and were subject only to the laws of said States. Those contracts could have been sold by Ken Aker to any other bank or finance company just as readily as Girard. The Uniform Commercial Code did not become effective in West Virginia until July 1, 1964, and in North Carolina until midnight June 30, 1967. The Floor Plan and Financing Agreements were made in 1963, and the sales involved in this law suit were made prior to 1966 and Girard undertook to repossess and dispose of the mobile homes without regard to the customers' equities, and the laws of the states where they were when the customers were ruthlessly dispossessed. The trial judge, disregarding Ken Aker's right to be heard in a final argument, paid no attention whatsoever to the laws of West Virginia and North Carolina, and wrongly applied the Uniform Commercial Code of Pennsylvania. Girard never attempted to dispose of the securities it held under the installment or conditional sale agreements, but resorted to the mobile homes that were security therefor, and disposed of them in an entirely illegal manner, as herein more fully later set out. Girard changed its policy and restricted its financing of mobile home to an area near Philadelphia, which the customers were not responsible for its doing, and whenever an installment upon an account became due accellerated the balance and demanded possession regardless of the buyers' rights to overcome their defaults and retain possession. The Uniform Commercial Code of Pennsylvania was not ap-

plicable, but Girard's incompetent collectors undertook to apply it, and disregarded the laws of West Virginia and North Carolina that were applicable. The trial Judge erroneously made the same error.

Under the Uniform Commercial Code of Pennsylvania foreclosure sales had to be by "commercial units." Under definitions, Section 5, GENERAL CONSTRUCTION OF SUBJECT MATTER, it provided, "Commercial unit means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suit of furniture or assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole," (paragraph 6)

Instead of offering the mobile homes, sold originally singly to users, to other people who might desire them for homes, Griard mailed eleven letters to mobile homes dealers who could buy at wholesale prices from manufacturers, all out of the states where the mobile homes were repossessed except one dealer, inviting them to bid on nineteen. Receiving no reply from any of them Girard's representatives called three dealers over long distance and induced them to make offers sight unseen for twenty-two mobile homes instead of nineteen. The highest offer thereby received was from Dick Moore, Inc., of Memphis, Tennessee, who offered $28,200 for the twenty-two in a single lot. Girard refused to let Ken Aker bid on any of them, and demanded that Ken Aker pay the entire balance it claimed due, $71,408.76, which was about $12,524.10 over the amount the trial judge finally found due Girard.

The Uniform Commercial Code of Pennsylvania under which Girard's representatives acted provided that the sale had to be commercially reasonable in every aspect, including method, manner, time, place and terms, which was surely not complied with in any respect in the instant situation. Very few dealers could raise the amount of cash required to make a bid in so short a time, and they would not be interested in offering what the mobile homes would be worth to families who could make use of one each for a home and to save rent. Such a method of disposing of the mobile homes as Girard used was surely preposterous, and did not meet the requirements of the applicable laws of West Virginia and North Carolina in any respect, as hereinafter explained.

A notice of Girard's intention to accept the Dick Moore, Inc. offer was mailed as shown by the post office stamp, at Philadelphia, Pennsylvania on November 1, 1966, certified. It stated that unless Ken Aker paid the entire amount Girard claimed owed it by 9:00 o'clock A.M., (Friday), November 4, 1966, Dick Moore, Inc.' offer would at that time be accepted. Notice of Girard's letter having arrived (see photocopy of envelope and return receipt in exhibits) was placed in Ken Aker's post office box on November 4, 1966, according to the post office stamp on the envelope and on the receipt for the certified letter Girard requested (see photocopies in exhibits), it was not delivered to Ken Aker until the 8th of November, 1966, thus Girard was bound to have known that Ken Aker had not received the notice. Girard contended that it did not close the Dick Moore deal until November 25, 1966, but gave no notice whatever to Ken Aker that it had not done as stated in Girard's letter mailed November 1, 1966 from Philadelphia. Dick Moore, however, had arranged on November 2nd, 1966 to get a permit from the State of West Virginia to move some of the mobile

homes to the Kentucky line, and did have some moved on November 3rd, 1966. (See testimony of Roy Hoel, Volume II commencing on page 222, and Volume III at page 248). The fact that Dick Moore had to borrow some of the money he needed to pay for the twenty-two mobile homes and did not complete his arrangements until the 25th day of November, 1966, had noting to do with whether Girard had accepted his offer on November 4, 1966 as Girard had advised Ken Aker it would do, and Ken Aker thought it had done. In any event the notice did not meet legal requirements in any way, or under any law.

On the question as to whether or not the sale of twenty-two mobile homes in one lot was reasonable even under the Pennsylvania Uniform Commercial Code was one of law, as a sale of that many in one lot to mobile homes dealers who could buy at wholesale prices from manufacturers could not be expected to bring nearly as much as if they were sold at retail singly to customers who wished to use them as homes and save rent, like they were sold in the first place. Twenty-two were not a commercial unit anyway.

During the trial the judge said, "It is my impression at this point that this portion of the transaction having to do with the trust receipts, floor planning and individual sales is covered by the Uniform Commercial Code and the question is a matter of law as to what is commercially reasonable. I will receive this evidence subject to objection and when I decide the question of law I will know how relevant the evidence is." (Volume III, page 248, Record, page 618). In the Court's Memorandum of Opinion he held the sale of the mobile homes in loss of 22 and 8 to be reasonable under the Uniform Commercial Code. Counsel for Ken Aker contends that the Court's finding should have been known

to him before the judge announced his decision, and that either way such holding was completely absurd, and not a lawful way to foreclose under any applicable Uniform Commercial Code or the laws of West Virginia or North Carolina. *Unless the sale was made in a lawful manner Ken Aker could not be liable for a deficiency.* Under the Uniform Commercial Code foreclosure sales had to be made by commercial units, and under definitions at the beginning of the Uniform Commercial Code the sale of twenty-two or even 8 mobile homes could not lawfully been held to be commercial units. They certainly could not have been expected to have brought as high prices sold to wholesale buyers in such large numbers, as to retail buyers who desired them for their homes. Furthermore, there was no way to determine the deficiency against the original purchasers against whom there might be recourse, which Girard threatened to enforce in its notice sent to them when Girard repossessed their mobile homes in each case separately.

7. At the conclusion of Defendant's motion to dismiss, and in the amended answer dated the 21st day of September, 1968, defendant demanded trial by jury, but the Court rejected both, reciting in its order of September 14, 1970 that the case came on for trial pursuant to the pretrial conference order of the Court entered on June 4, 1968 (Record page 268), making the remark "the case was too complicated for a jury." Defendant believes it was denied its right to trial by jury guaranteed under the United States Constitution, Amendment XIV.

8. Defendant duly alleged (Record page 148) provisions of the Uniform Commercial Code, Chapter 46, Article 2, Section 302, which state, "If the court as a matter

of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Sections 706 and 709 of the same article provides, "every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract * * * Where the resale is at private sale the seller must give the buyer reasonable notice of his intention to rese . * * * It must be made at a usual place or market for public sale if one is reasonably available * * * seller must give buyer reasonable notice of the time and place of resale * * * (c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders, * * * The seller * * * must account for any excess over the amount of his security interest." these requirements were not complied with by Girard's representatives in any respect.

9. At the time both parties rested testimony and earlier defendant requested an opportunity to be heard before any decision was reached, as had also been requested earlier in the case. (Volume III, pages 292, 293) "I am going to read these contracts and will give you a chance to argue the case and brief it extensively. You don't have to make a speech to me now, Mr. Meldahl." Record, page 766, the Court said. "After the record has been delivered you may come down and see me and I will set up a schedule for filing briefs and hearing oral arguments, if you wish, sometime in the future." Counsel for Ken Aker spoke to the

Judge at least five times during the period between January 9, 1969, when the testimony was concluded, and August 3, 1970 when the Memorandum of Opinion was issued a space of time about twenty months, asking when the Court would be ready to hear arguments, and each time was told that the judge did not know yet. He was astonished to receive the decision without having had the opportunity to argue the case as had been promised. The final order entered September 14, 1970 provided "to which decisions and rulings of this Court and the judgment rendered thereon the defendant did object and except." When counsel for defendant went down to protest he was told that the order fully preserved all of defendant's rights. It is believed that had defendant's counsel been afforded the opportunity to point out the many errors herein set out, these errors would not havet been made, and that defendant would have been allowed to recover damages for the losses it had sustained. The Court had taken the position throughout the case that Girard could sell the original customers' property any way it saw fit, and recover the deficit from Ken Aker regardless of whether there would have been a deficit if the sales of the customers' property had been legal, and whether or not Girard had offered the securities it held for sale in the first instance. For the reasons hereinbefore stated defendant contends that this was not lawful.

10. Defendant believes that the decision of the United States Supreme Court in *Mathews et al* v. *West Virginia ex rel.* Hamilton, Prosecuting Attorney, 320 U.S. 707, disposes of the Constitutional questions controlling the present case. In that case Mrs. Mathews and Lavon Kelley were offering literature to passers by a block apart on a street in Grantsville, Calhoun County, West Virginia. Nothing happened where Lavon Kelley was. A drunk came along

and ordered Mrs. Mathews to get off the street. When she failed to comply he grabbed her literature, tore it up and threw it on the sidewalk, then struck her in the face with his fist. Her son half his size and age saw this happen and went to his mother's defense. The prosecuting attorney obtained a temporary injunction against Mrs. Mathews and Lavon Kelley offering the literature on the street, alleging that they had violated no law, so that there was no remedy at law, but that if they continued to do so "blood would be shed." Upon taking depositions to dissolve the injunction the plaintiff's witinesses admitted that neither Mrs. Mathews nor Lavon Kelley would shed anyone's blood, that they were both perfect ladies, but that if they were not kept off the streets some unkown person or persons would shed their blood. The prosecutor was asked why he did not seek the injunction against whomever he expected to do the unlawful acts instead of those whom he knew would not violate the law. His answer was that he didn't wish to do so. The circuit judge of the county nevertheless made the injunction permanent, and upon an appeal to the Supreme Court of Appeals of West Virginia that august court refused to docket the case upon four applications. On the last counsel making the applications asked the Supreme Court of Appeals either to docket the case or refuse it as plainly right, so the decision would be final, whereupon the court refused it as plainly right. One of the Supreme Court of Appeal's judges told the writer later that all of the judges know they were wrong, that he wished to grant the appeal, but went along with the others who didn't want to. The Supreme Court of the United States dissolved the injunction in the decision cited. Approximately the same situation, except for the refusal as plainly right, exists in this present case of *Girard* v. *Ken Aker*.

Another extremely interesting detail occurred in the Mathews case which Your Honors may enjoy knowing about. Six months afterward a person apologized to Mrs. Mathews for paying the drunk ten dollars for doing what the drunk did. Lavon Kelley had already completed the credits entitling her to graduate from high school, but was staying in school for several extra credits since graduation ceremonies were not to be held until June. The county board of education ordered the principal of the high school to expel her. He called her into his office and told her he would not do so, but that she might save him from being fired if she would withdraw, which she did. The board of education heard what had happened and told the principal he could either expel her notwithstanding, or resign. He handed in his resignation already prepared, and enlisted in the United States Navy, then prepared an explanation of what he had done, and distributed 300 copies throughout the county. Students in the high school liked the principal and considered the action of the board wrongful. All of them went on a strike and for three days none came to school. The prosecuting attorney then sent letters to their parents threatening to prosecute them if they did not compel their children to attend. The parents then insisted that their children attend, and that night the high school burned down. The board of education had to rent all of the houses around the block and make the occupants move in order to have a place to conduct high school. In the present case the Supreme Court of Appeals of West Virginia has acted about the same way it did in the Mathews case.

Under the Dealer Floor Plan Agreement, which provided that it was to be governed by the laws of Pennsylvania, Girard became the owner immediately of the mobile homes purchased from manufacturers and wholesalers with funds it furnished Ken Aker as its trustee and agent. Those mobile

homes were placed on sales lots in West Virginia and North Carolina to be delivered to retail buyers after Girard had investigated their credit and approved each sale. Ken Aker acted as the agent of Girard as undisclosed principal. All mobile homes acquried under the Dealer Floor Plan Agreement were paid for with the retail buyers' down payments and deferred purchase money contracts as they were turned over to Girard in each instance, so the Dealer Floor Plan Agreement was not properly involved in this action. Furthermore Girard was doing business unlawfully in North Carolina and West Virginia because it was not qualified under the laws of either of these states. This, however, did not deprive Ken Aker of its right to maintain a counter suit for the damages it had sustained by reason of Girard's harmful and wrongful acts which had proved so disastrous to Ken Aker.

The Financing Agreement was an entirely separate matter, and the trial Judge erred in treating the two agreements as one. Even Girard did not claim they were one. The Financing Agreement made no mention of the laws of any State to govern its interpretation and application. It bore only the date of January 28, 1963, was signed by Ken Aker in Charleston, West Virginia and delivered there to Girard's representatives. It did not say where Girard would buy the installment and conditional sale contracts, but naturally they would be and were transmitted from Charleston, West Virginia, or their main office in North Carolina, by United States mail as Girard's agent, since Girard had solicited the business from Ken Aker at its Charleston office.

The Financing Agreement provided that the dealer, Girard's trustee and agent, would have no obligation to buy back any contract beyond 'the one-hundred and twenty-five (125) day period herein referred to." No mention of the

125 day period was made elsewhere in the agreement. If this was a mistake it was Girard's who furnished the form, not Ken Aker's, so it should be construed against Girard. No specific mention was made in the agreement either as to when the 125 day period was to commence, nor was anything said orally about it by those Girard sent to negotiate the agreement. Mr. Honaker, president of Ken Aker, said he agreed to it because of his impression that it ran from the dates of the contracts. The trial Judge wrongfully allowed Girard over objection to offer evidence of a course of dealings. The trial Judge found that only three of the thirty purchasers had defaulted within 125 days of the dates of the contracts, and that no demand had been made within 125 days of the first defaults upon seven of the customers who had defaulted, the amounts Girard claimed thereon for this reason being $22,915.83, on which account the Court reduced Girard's recovery about $12,524.10 without taking into account interest Girard had included upon that part of its claim. The trial judge held that the 125 days ran from the first default.

The notice Girard sent to the purchasers stated that it would look at them for any deficiency. (Set out on Page 10, hereof). It also notified them that they were to send all payments on their contracts direct to Girard. Yet Girard disregarded this entirely in asserting its claim against Ken Aker.

Girard's original claim against Ken Aker was for $71,408.76, which amount included all of its financing charges, but did not take into account the purchasers' down payments nor any of the amounts collected by Girard on their contracts. Girard did not pay or allow anything for the $8,199.73 due Ken Aker for repairing, reconditioning,

refurbishing and preparing repossessed mobile homes for resale, and Girard did not allow Ken Aker any credit for the over $28,000 bad debt reserve it held, claiming that this reserve was being retained to apply upon possible defaults that might occur on other accounts, all of which were long past the 125 day period, and which Girard still holds without showing any credit or other applicatoin. If this is not unconscionable what is it?

The sales to customers in West Virginia and North Carolina were made without any disclosure to them of the Dealer Floor Plan and Financing agreements between Girard and Ken Aker. Their customers had bought under public policy free from any lien or encumbrance, just as they would have done an automobile or a suit of clothes. These transactions were clearly under the laws of West Virginia and North Carolina, and could not be considered governed by the Uniform Commercial Code of Pennsylvania, as the Judge should have concluded. Neither were they governed by the Uniform Commercial Codes of West Virginia and North Carolina until after these laws became in effect, which in North Carolina was not until June 30, 1967. Most of the mobile homes Girard sold were in North Carolina, and all of them were sold in 1966 before Uniform Commercial Code went into effect there, so that it could not have applied. These mobile homes were mixed in with others making sales of both lots illegal. Some were in West Virginia, and others were in North Carolina. Without their being sold singly there was no way of determining the deficiency for which defaulting buyers were liable.

Prior to the effective date of the Uniform Commercial Code in North Carolina July 1, 1967, the Uniform Trust Receipts Act applied there. (N.C. Code 1961, c. 574). It provided that the place of sale was to be where the property

was when repossessed, Chapter 45 part 21.5; presence of the personal property at the sale, 45-21.6; sell by the method which produces the highest price, 45-21.9; sell by parts only so many as necessary to satisfy the obligation, 45-21.10; (the sale of a grocery store by a constable in Charleston, West Virginia was set aside because the sale of a few items would have been sufficient to satisfy the judgment and costs, which it did.) Part 2, Procedure of sale 45-21.16, provided (2) Notice had to state date, hour and place of sale; (3) Describe the property to be sold; (4) Describe personal property as in the instrument containing the lien; (5) State the terms of sale; (6) State that the property shall be sold subject to taxes; 45-21.18(b) Notice posted at the court house door of the county in which the sale is held ten days immediately before the sale (c) the debtor given at least ten days notice before the date of sale by registered mail addrssed to the vendee (1) at his actual address, or if not known at the address furnished by the vendee. Section 45-21.20 entitled the vendee to satisfy his obligation before completion of the sale; 45-21.21 provided for notice to vendee of the place of sale, (c) posting of notice of a postponement (to be not over six days). Section 45-21.23 prohibited the sale being held before ten o'clock A.M., or after four o'clock P.M., except to ten P.M. where needed to dispose of a quantity of personal property. The trial judge ignored and disregarded all of these requirements of North Craolina law, as he considered the Uniform Commercial Code of Pennsylvania controlling. Such could not have been the case under the circumstances hereinbefore mentioned.

There was no forclosure of the mobile homes by Girard under the requirements of either West Virginia or North

Carolina, therefore the attempted sales to Dick Moore, Inc. and others were entirly illegal and Ken Aker could not be liable for any deficiency. All of the mobile home buyers had and likely still have rights of action against Girard under the laws of their respective states. The sales to mobile homes dealers without foreclosing the previous buyers equities were also unlawful. Sales to dealers who have wholesale privileges in lots of twenty-two and even eight were not legal under the laws of West Virginia and North Carolina. The Uniform Commercial Code of Pennsylvania could not be applied thereto, and even if it had been, the sales were not conducted to meet the requiremnts of that law either. Girard had not given Ken Aker the notice required to make those sales legal. The notice sent did not reach the Charleston postoffice until after the offer of Dick Moore, Inc. had been accepted, according to what it stated. That sale took place before ten o'clock on that day, most of the mobile homes included were in North Carolina, where the sale could not be made before ten o'clock A.M. on that day.

The trial judge deprived Ken Aker of its right to be heard in argument at the conclusion of the trial as it had requested, and been promised an opportunity to do. All of the errors herein pointed out could have been avoided and Ken Aker saved from the damage it has suffered if this right had been accorded to it. Ken Aker was definitely denied due process of law in not being given its rightful opportunity to be heard, and this right was denied also by the Supreme Court of Appeals of West Virginia without reason, as in the *Mathews et al.* v. *West Virginia ex rel.* Hamilton, Prosecuting Attorney, 320 U.S. 707. See Appendix.

The judgments of the courts below were contrary to the law and the evidence, and without evidence to support them.

Ken Aker was unlawfully denied the right to prove damages it had sustained by Girard's numerous wrongful acts, in support of its counter claim, and Girard's defamation due to the letters of false allegations sent to other finance companies, including Charleston National Bank, Michigan National Bank, and Associates Discount Corporation, and reports broadcast by credit reporting companies and newspapers.

CONCLUSION

For the foregoing reasons the judgment entered by the Circuit Court of Kanawha County, West Virginia should be set aside as violating rights to which Ken Aker, Inc. was and is entitled under the Constitution of the United States, and a new trial ab initio awarded. Amen.

Respectfully submitted,

HORACE S. MELDAHL
Davidson Building
Charleston, West Virginia
Attorney for Petitioner

APPENDIX

320 U.S. 707 No. 155. *Mathews et al.* v. *West Virginia ex rel.* Hamliton, Prosecuting Attorney. On petition for writ of certiorari to the Circuit Court of Calhoun County, West Virginia. Oct. 18, 1943. Per Curiam: The petition for writ of certiorari is granted. Subsequent to the decision of the Supreme Court of Appeals on the ground that the decree of the Circuit Court of Calhoun County was "plainly right", this Court in *Taylor* v. *Mississippi*, 319 U.S. 583, *Benoit* v. *Mississippi*, 319 U.S. 583, *Cummings* v. *Missippippi*, 319 U.S. 583, and *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, considered questions having a bearing on the issues in the present case. Accordingly we vacat the judgment and remand the cause to the Circuit Court of Calhoun County for further consideration in the light of our decision in those cases. *New York ex rel. Whitman* v. *Wilson*, 318 U.S. 688, 690-91, and cases cited.

.....Final Order, entered September 14, 1970, Record, pages 768, 769, 770, incorporating *Memorandum of Opinion* dated August 3, 1970, Record pages 771 to 787 inclusive. Second Application for Writ of Error by the Supreme Court of Appeals of West Virginia, was denied without reasons on the 14th day of June, 1971 when time for a further application had expired.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of June, 1971, the following order was made and entered, to-wit:

GIRARD TRUST BANK, a Pennsylvania corporation

vs. — Civil Action No. 7444

KEN AKER, INC., a West Virginia corporation

On a former day, to-wit, May 3, 1971, came again the petitioner, Ken Aker, Inc., by Horace S. Meldahl, its attorney and presented to the Court its first and second petitions praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in this action on the 14th day of September, 1970, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused on this second application.

A True Copy,

Attest:

GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

Supreme Court, U.S.
FILED
NOV 10 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. 71-270

KEN AKER, INC., a corporate citizen of West Virginia,
Petitioner,

v.

GIRARD TRUST BANK, a corporate citizen of Pennsylvania,
Respondent,

PETITION FOR REHEARING OF ORDERS ON PETITION FOR WRIT OF CERTIORARI (TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA) UPON SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER NOT PREVIOUSLY PRESENTED.

CERTIFICATE OF COUNSEL

The undersigned, counsel for petitioner, hereby certifies that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

Horace S. Meldahl

Horace S. Meldahl, Davidson Bldg.
Charleston, West Virginia 25301

SHAFER PRINTING COMPANY, CHARLESTON, WEST VIRGINIA

No. 71-270

IN THE

SUPREME COURT OF THE UNITED STATES

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KEN AKER, INC., a corporate citizen of West Virginia,
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I have asked a clerk of the Supreme Court of the United States if any explanation has been assigned for denying the writ of certiorari upon the original application, and have been told that none was given. It is therefore like groping in the dark to imagine the reasons. The petition for certiorari was denied October 26, 1971.

It is likely that the Honorable Justices have assumed that the record certified by the circuit court clerk tells the whole story though it does not. because the courts below do not make some matters parts of the record even upon request. Yet they may be substantiated by sworn testimony of persons present.

All members of the Supreme Court of the United States are familiar with the statutes creating civil liability and even making it criminal to deprive any persons "under color of law" of civil rights guaranteed under the United States Constitution. Section 1, Amendment XIV prohibits any State from making or enforcing any law which abridges the privileges or immunities of *any person* by depriving him of life. liberty or property without due process of law, and to deny any person within its jurisdiction the equal protection of the law. Amendment VII provides "In suits at common law, where the value of controversy shall exceed twenty dollars, the right to trial by jury as explained in the following paragraph.

At the pretrial conference on June 4, 1968 the trial Judge gave Girard the privilege of amending its pleading. and it did so. Whereupon Ken Aker in its answer asked for trial by jury, and the clerk of that court set the case up for jury trial as shown by a photocopy of his docket filed at the conclusion of this petition for rehearing. Yet the trial Judge ignored this stating, "and this case came on for trial pursuant to the pretrial conference of this Court entered on June 4, 1968." Appendix II: page 66. Ken Aker contends that it has been deprived of civil rights guaranteed by the United States Constitution in this and other respects herein mentioned and referred to, and asks that the original petition for certiorary be reread and considered in conjunction with this petition for rehearing same.

It has been impossble for Ken Aiker to have all pertinent parts of the record printed in an appendix because it has been ruined financially by the wrongful actions of Girard in the many respects complained of in this cause. After many years of success in its business and the establishment of an excellent reputation which enabled it to borrow large sums of money and acquire an enormous amount of property on credit, it no longer enjoys the ability to do either because of the untruthful charges made against it by Girard in this matter, which if known stand disproved. Certain material parts of the record not previously referred to and facts connected therewith are herein cited. All of Ken Aker's property and assets have now been taken wrongfully by Girard.

When the final order prepared by Girard's attorney was was submitted to counsel for Ken Aker, both made a trip to the court house to see the Judge because it did not show a specific objection to the fact that counsel for Ken Aker had been denied an opportunity to make a final argument and summation. The final order entered September 14, 1970, Appendix II, page 68, shows at pages 66-67 that the testimony had been concluded January 9, 1969, twenty months and five days earlier. The trial Judge declined to change the order saying the provision at the bottom of page 67 "to which decisions and rulings of this Court and the judgment rendered thereon the defendant did object and except" provided full protection. It seems to counsel for Ken Aker that this omission was responsible for the Supreme Court of Appeals of West Virginia failing to grant a writ of error on the two applications therefor.

This morning, October 29, 1971, counsel for Ken Aker asked the trial Judge if he remembered the objections to

the final order because it did not show that an opportunity to make a concluding argument and summary had not been afforded prior to the rendering of the decision as had been promised at the time the testimony was concluded, and the five or more times during the twenty months intervening counsel for Ken Aker had been to ascertain from him when he would be ready to give this case further consideration, and being told each time by the Judge that he didn't know. The trial Judge stated that he remembered about the objection on the ground stated, to the order, but did not recall about the several enquiries made at the motion hour. He said there was nothing he could do about it now. Opposing counsel could verify about the objecton if he would, and the Judge would probably acknowledge it to the Supreme Court if a justice thereof wrote him a letter enquiring about it. At the time of the trial opposing counsel was president of the local bar association, and under a local custom commonly presided in place of the Judge whenever the latter had occasion to be absent.

Upon oral applications to the Supreme Court of Appeals of West Virginia no record is made of what is said, so there is no way of showing all of the grounds assigned, but they were substantially the same as set out in this and the previous petitions to the Supreme Court of the United States. The disposition made by the State Supreme Court was no different than in *Mathews et al.* v. *West Virginia ex rel Hamilton, Prosecuting Attorney*, 320 U. S. 707, No. 155 which Your Honors reversed, the material facts of which are set out in the original petiton and final order in the appendix in this cause.

According to the testimony of Girard's chief witness, McGarrigan, Girard claimed only $53,001.55 due it after it had applied $38,120.36 all of which was realized from

its sale of mobile homes except $876.40 derived from insurance cancellation, although its complaints demanded $56,506.38. Appendix 1, page 46. Adding the $53,001.55 and $38,120.36 together places the orignal amount claimed at $91,121.91 against the thirty mobile homes. This did not take into account the original down payments or subsequent payments which were above that aggregate.

At the time Girard changed its policy and started this trouble it held $28,000 in a dealer reserve account belonging to Ken Aker. In the meantime it had foreclosed upon a number of other mobile homes illegally and charged up alleged deficiencies never explained reducing that reserve to $4,202.18 and $1,291.98 interest allowance thereon, a total of $5,494.16 credit still admittedly due Ken Aker, as shown by statements received from Girard under date of August 31, 1971 attached at the end of this petition, yet at the time of the trial Girard acknowledged only $1,291.98 in said account. Original reply to defendant's counterclaim. Appendix II, page 48.

Although the "Blue Book" is accepted in the mobile home trade as a standard valuation appraisal accepted generally by financial institutions its introduction was rejected by the trial Judge. Mr. Kenneth Honaker, president of Ken Aker, who had been in the moble homes business for many years, placed a valuation upon the mobile homes involved in this matter repossessed by Girard at $96,000 at the time of resale. A number of them had been repaired and refurbished for resale, and had billed Girard therefor in the amount of $8,199.73, which was ignored by both Girard and the Court. Petition for Certiorari page 19. He obtained bank commitments which enabled him to offer Girard $66,000 for the mobile homes, but it demanded $71,408.76, yet it later sold those mobile homes for $39,501.25, re-

fusing to let Ken Aker bid upon either the 22 sold to Dick Moore, or the 8 sold to others, which was also illegal. As a matter of fact they could be foreclosed only singly, and Ken Aker was entitled to bid upon each. One mobile home sold in the group of eight for $11.301.25, was practically new and by itself was worth $7.000.00. Surely it should have been singled out and sold separately even under the Pennsylvania Uniform Commercial Code. The only way any of them could be foreclosed legally was according to the applicable statutes of West Virginia and North Carolina, which the Court's final order shows was not even considered, as the Court says it based its decision entirely upon the Pennsylvania Uniform Commercal Code.

At one time during the trial the Judge became very impatient with witness Buksi for not having certain records in court in obedience to a subpoena duces tecum which had been left at his home late Friday night while he was away, and which required going through an enormous amount of records with which he was not familiar, and the person in charge thereof was away. He was faced also with the necessity of preparing Saturday for religous services Sunday as head of the religious denomination of which he was pastor. When a motion was made at the first opportunity Monday, the Judge said he probably would have sustained a motion to quash the subpoena had it been made the previous Saturday, but counsel for Ken Aker had not heard about it in time to do so then. The trial was then recessed until those records were brought it, which was very disconcerting to both Mr. Buksi, and counsel for Ken Aker. Record, page 530. Our court reporters do not include in their transcripts all that occurs in such incidents.

The summary of pleadings in the Memorandum of Opin-

ion is likely to give the impression that they recite facts, but some of the allegations are unquestionably contrary thereto as the decision of the Court plainly shows, the judgment awarded being for $12,524.10 less than Girard demanded, without taking into account interest upon this amount included in the total judgment. It is believed that it was improper to include interest, even if the judgment had been proper, for the twenty months the Judge took to handle other business of the court, rather than render his decision immediately.

The Court found the deficiency balance on mobile homes listed in schedules A and B $33,916.81, and schedule C $6,525.09, total $40,591.90, which was $16,011 less than the $56,506.38 Girard originally demanded. Girard had no right on any theory to refuse to receive bids from Ken Aker, or to demand that amount in excess of what the trial Judge found due it as a condition to a settlement. If Girard had not changed its policy, and had allowed Ken Aker to have resold the mobile homes at retail in the customary manner, as did Michigan National Bank, neither Girard, Ken Aker nor the original retail customers would have sustained appreciable losses.

The trial Judge likewise erred in refusing to award Ken Aker judgment upon its counterclaim for losses it sustained as a result of Girard's action and defamatory conduct accusing Ken Aker of double financing when it was Girard who was solely responsible for holding up payments and titles, as was conclusively shown by evidence Girard's witnesses did not deny.

Furthermore the sorrowful losses caused the retail customers by Girard accelerating entire balance upon failure to pay a single payment or at most two payments as soon

as due, during a period of exceptionally unfavorable conditions in the coal fields, was in itself unconscionable and inexcusable, for a bank that had hundreds of millions of dollars and was continuing to make other loans, and especially a bank established upon the fortunes in anthracite coal lands derived from its founder Stephen A. Girard.

Some consideration must be shown for the struggling poor people in America, or else there will be an upheaval hitherto unknown. The decision of the Supreme Court of the United States that private property cannot be taken without just compensation, and using government money to buy slaves and give them their freedom was not arquiring them for a public purpose, which resulted in our Civil War and the loss of many lives and many times as much money, should not occur again. It is time for our courts to recognize an obligation to administer justice and place human rights above the greed of the wealthy. If our Civil War had not resulted in the abolition of slavery the slaves by now would have so outnumbered other inhabitants that they would have been able to revolt and make others their slaves as happened in ancient Rome. "Therefore get wisdom, and with all thy getting get understanding."

If the NON RECOURSE provision of the Financing Agreement is not interpreted as running from the dates of each transaction it could not have had any appreciable value. It should therefore be construed according to its terms, rather than misinterpretations of any parties or others. What Mr. Buksi might have supposed at the time his discovery deposition was taken could not have been controlling. The conduct of Girard's witnesses was not consistant with its hindsight interpretation when it was interested in getting all it could. Mr. Honaker, whose approval was necessary to obtain Ken Aker's signature, did not

take the NON RECOURSE provision to mean anything other than what it said, NON RECOURSE. It should be so construed as a matter of law.

SUMMARY

In a certain case the judge asked the sheriff why he did not have a witness in court he had been ordered to bring. The sheriff answered there were twelve reasons, first because he was dead and buried. The judge said never mind the others.

In the present case there are several reasons, each of which should be equally sufficient for the Supreme Court granting this and the preceding petition, the evidence in regard thereto being undisputed.

First, the Court below says unequivocally that its decision was based upon the Uniform Commercial Code of Pennsylvania, yet the evidence shows conclusively that all of the deferred purchase money agreements sued on were made between Ken Aker and retail customers in West Virginia and North Carolina, and were governed by the laws of those states, those customers knowing nothing about any agreements between Ken Aker and Girard, which did not necessarily apply anyway, as Ken Aker could have sold all of said instruments to Michigan National Bank or any other finance company just as well, and the customers could not be deprived of their equities without foreclosure under the laws of West Virginia, the provisions of which could not be waived, and North Carolina equally required, and they could not be commingled, as was done, nor foreclosed other than singly as they were sold to the retail customers in the first place, so that the whole transaction was illegal

and void, and there was no way of determining a deficiency, nor of Ken Aker resorting to a deficiency claim against its customers.

Second. The notice Girard sent to Ken Aker of its intention to accept Dick Moore's offer at 9:00 A.M. November 4, 1966, mailed from Philadelphia, Pennsylvania November 1, 1966, in nonsense met the required ten days notice. Even if it were true that Girard had told Ken Aker's counsel that it intended to sell the mobile homes at some time undetermined it would not constitute legal notice under any law. See paragraph commencing at the middle of page 25 of the petition for certiorari.

Third, Denial of trial by jury.

Petitioner therefore prays that a rehearing of orders on petition for the writ of certiorari upon substantial grounds available to petitioner not previously presented, hereinbefore set out may be granted, and that the original petition for writ of certiorari to the Circuit Court of Kanawha County, West Virginia and Appendix I and II thereto may be reviewed and considered in conjunction therewith, and the prayers thereof granted, rights guaranteed under the United States Constitution having been denied. It is as much a denial of *due process* for the United States Supreme Court to deny a petition for writ of certiorari without reasons as for lower judicial and administrative bodies to do so.

Horace S. Meldahl

Horace S. Meldahl, Counsel for Ken Aker, Inc.
210 Davidson Bldg., 910 Quarrier Street,
Charleston. West Virginia 25301

CERTIFICATE OF SERVICE

The undersigned, Horace S. Meldahl, hereby certifies that he has this 27th day of November, 1971, served the foregoing petition for rehearing of orders on petition for writ of certiorari (to the Circuit Court of Kanawha County, West Virginia) upon subtantial grounds available to petitioner not previously presented, upon Girard Trust Bank, by delivering in person three copies thereof to James Knight Brown, counsel for said Girard Trust Bank, at his offices on the 16th floor of the Kanawha Valley Bank Building, Capitol and Lee Streets, Charleston, West Virginia 25301.

Horace S. Meldahl

Horace S. Meldahl, Counsel for Ken Aker, Inc.,
210 Davidson Bldg.
Charleston, West Virginia 25301

GIRARD BANK
Philadelphia PA

Ken Aker, Inc.
Box # 21
Charleston, W. Va.

3247

Dealer's Reserve Statement

Account No.	Charges	Credits	Date	Balance
		Bal. Forward	AUG 31 71	4,202.18 CR

GIRARD BANK
Philadelphia PA

Dealer's Reserve Statement

GIRARD BANK
Philadelphia PA

Ken Aker, Inc.
Box # 21
Charleston, W. Va.

3247

5% reserve on 10 yr. Mobile home contracts

Dealer's Reserve Statement

Account No	Charges	Credits	Date	Balance
		Bal. Forward	AUG 31 71	1,291.98 CR

GIRARD BANK
Philadelphia PA

GIRARD BANK
Philadelphia PA

JURY _____ ACTION

CIRCUIT _____ COURT

CIVIL DOCKET

Sheet No. 1

CASE NO. [illegible]

Girard Trust Bank Plaintiff vs. Defendant Ken Aker, Inc.

James K. Brown Attorneys — Horace S. Meldahl Attorneys

[illegible] McClung Attorneys — Attorneys

DATE	PROCEEDINGS	Cash Book No.	Page No.	Plaintiff Costs	Defendant Costs
	Sum. & 2 copies; Complaint with exhibit attached	[illegible]	[illegible]	[illegible]	1 [illegible]
	Return				
	Answer				
	Pre-Trial Order; Order; Motion and Counterclaim				
	Order				
	Reply of plaintiff to Counterclaim of defendant				
	Interrogatories to Ken Aker, Inc., a corp. and Request for Admissions and Motion and Notice with return				
	Sub. & 2 copies for plaintiff; Request for Admissions with Exhibit No. 1 and 2 attached and Notice of Depositions with return				
	Request for Admissions				
	Answer of Ken Aker, Inc to Interrogatories and Request for Admissions				
	Order				
	Sub. & 5 copies for plaintiff; By Cash	27	120		50
	Sub. & 15 copies for defendant; By Cash	27	122	3	75
	Sub. & 1 copy for plaintiff; By Cash	27	125		25
	Discovery Deposition of Michael Lawrence Buksi; Discovery Deposition of Kenneth (C.K.) Honaker and Notice of Filing of Deposition with return				

JURY ACTION Sheet No. 2 **CIVIL DOCKET** CASE NO. 7[illegible]

CIRCUIT COURT

[illegible] Bank Plaintiff vs. Defendant Ken Aker, Inc.

[illegible]wn - A. Keith McClung Attorneys Horace S. Meldahl Attorneys

Attorneys Attorneys

NOTATION DATE	PROCEEDINGS	Cash Book No.	Page No.	Plaintiff Costs	Defendant Costs
	Amended Complaint				
	Motion to Dismiss and Answer adopting the foregoing caption and presenting defenses under rule 12(b) and Counterclaim				
	Transcript, Volume I				
	Reply of plaintiff to Counterclaim of defendant				
	Issued Sub. & 20 copies for defendant; By Cash	27	191		5 00
	Sub. & 3 copies for plaintiff				
	1 Sub. Duces Tecum & 2 copies for plaintiff; By Check & Cash	27	192	1 25	
	1 Sub. Duces & 2 copies for plaintiff; By Check	28	1	50	
	Plaintiffs Exhibits No. 1 to 64 inclusive; Defendants Exhibits No. 1, 2, and 3				
	Sub. & 1 copy for plaintiff; By Cash	28	3	25	
	Sub. & 1 copy for plaintiff; By Cash	28	3	25	
	Transcript; Volume II; Transcript, Volume III; Exhibits				
	Order [illegible] letter of Memorandum or Opinion dated August 3, 1970, attached				
	Notice of Filing Transcript and Appeal; By Cash; (Clerk's fees for indexing record to Supreme Court of Appeals); Petition to Supreme Court of Appeals for Writ of Error of Ken Aker, Inc., a W.Va. Corp.	29	188		5 00
					CIRCUIT
	Order dated the 14th day of June, 1971, from Supreme Court of Appeals refusing appeal on second [illegible]				

JRY _____ ACTION

[illegible] TRUST BANK

_____ COURT

CIVIL DOCKET

CASE NO. 7444

[illegible] K. Brown Plaintiff vs. Defendant Ken Aker, Inc.,

[illegible] Keith McClung Attorneys — Horace S. Meldahl Attorneys

_____ Attorneys — _____ Attorneys

OTATION DATE.		PROCEEDINGS	Cash Book No.	Page No.	Plaintiff Costs	Defendant Costs
1971						
[illegible]	19	Record in accordance with Notice of Appeal was transmitted to United States Supreme Court by delivering to Horace S. Meldahl				
Nov	1	Order of Supreme Court of the United States refusing petition				

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA SS:

I, Jack Kinder, Clerk of the Circuit Court, of Kanawha County.West Virginia, do hereby certify that the foregoing three (3) Sheets are true copies of the Civil Docket Sheets in the Civil Action of Girard Trust Bank Vs., Ken Aker, Inc., Civil Action No. 7444

Given under my hand in the seal of said Court this 5th day of November, 1971

Jack Kinder CLERK
Circuit Court of Kanawha County
West Virginia